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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JACK R. DUCKWORTH and
INDIANA ATTORNEY GENERAL

Petitioners,

vs.

ARNOLD MAURICIO, JR.,

Respondent.

On Petition For a Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling that the State's knowing failure to disclose during discovery the identity of an alibi rebuttal witness it intended to call to testify violated due process, under this Court's decision in Wardius v. Oregon, 412 U.S. 470 (1973).

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OPINIONS BELOW

The decision of the United States Court of Appeals is reported at Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988). The decision of the United States District Court for the Northern District of Indiana is reported at Mauricio v. Duckworth, 633 F. Supp. 1302 (N.D. Ind. 1986).

JURISDICTION

The jurisdiction of the Court is invoked properly under 28 U.S.C. § 1254 (1). The petition was timely filed on June 20, 1988, within 90 days from the denial of Petitioner's petition for rehearing by the United States Court of Appeals for the Seventh Circuit. Although the petition was filed in this Court June 20, it was not received by respondent until July 11, 1988. This brief in opposition is timely filed, within the 30 days from receipt of the petition as allowed by Rule 22, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Respondent Arnold Mauricio, Jr., was convicted of aiding felony murder and robbery, in the circuit court of Allen County,

Indiana. He was sentenced to a term of 30 years in prison. His conviction was affirmed by the Indiana Supreme Court in Mauricio v. State, 476 N.E.2d 88 (Ind. 1985). On direct appeal, he claimed, inter alia, that his right to due process was denied by the admission into evidence of testimony by the State's alibi rebuttal witness Sharon McDonald, whose identity intentionally was not disclosed to the defense during the discovery process.

Subsequently petitioner filed an application for a writ of habeas corpus in the United States District Court for the Northern District of Indiana, raising the same due process claim advanced in the Indiana Supreme Court. The district court concluded that the State's failure to divulge its rebuttal witness violated Mauricio's right to due process, but denied the petition for habeas corpus upon concluding that the error was harmless. Mauricio v. Duckworth, 633 F. Supp. 1302 (N.D. Ind. 1986). The Court of Appeals for the Seventh Circuit reversed and granted the petition for writ of habeas corpus, concluding that Mauricio was denied due process of law and that the error was not harmless.

Pursuant to Indiana statutes and the State's motion, the trial court ordered the defendant to disclose his intention to offer an alibi and ordered him to disclose the names of all persons whom he might call at the trial as witnesses. The State was ordered to divulge its witnesses. Defendant listed six persons including Janice and William Tuttle, and Lisa Michaels, who testified regarding an alibi for Mauricio. The State listed 59 witnesses. Its list intentionally omitted the name of Sharon McDonald. At the time of complying with the court's discovery order, the State knew that McDonald would testify that she had been present at a meeting at which Michaels and Janice Tuttle agreed to testify falsely in support of Mauricio's alibi. McDonald had discussed her willingness to testify as stated above one month before the State tendered its witness list and five months before trial. The State was able under Indiana's discovery rules to depose defendant's witness and thus to know

their testimony. Defendant could not depose McDonald before trial and thus was surprised by her testimony.

At trial, Mauricio chose to present the alibi testimony. The State then called McDonald in rebuttal. The defense moved for a mistrial or to exclude her testimony but the motions were denied.

The district court and the circuit court of appeals each found that due process was violated by the non-reciprocal nature of the discovery in this case and the interference with Mauricio's ability to determine the nature of his defense. The evidence against Mauricio was circumstantial and tenuous. The surprise testimony of McDonald constituted a devastating blow to the defense and may well have led the jury to convict him. According to the Court of Appeals, "It is difficult to conceive of a more devastating revelation to a jury than that which occurred here.... [A]bsent McDonald's tainted rebuttal testimony, the State's case cannot fairly be described as 'overwhelming'...." 840 F.2d at 460.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

I. PETITIONER HAS NOT DEMONSTRATED SUFFICIENT JUSTIFICATION FOR THIS COURT TO GRANT A WRIT OF CERTIORARI.

The decision of the Seventh Circuit in this case does not represent a significant departure from this Court's decision in Wardius v. Oregon, 412 U.S. 470 (1973). That decision recognized that discovery is not required as an element of due process but that "discovery must be a two-way street." Id. at 475. This Court recognized that:

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state. (footness omitted).

Id. at 475-76. Wardius ruled that due process would not be

satisfied by the State disclosing only the time and place of the offense when the defendant discloses the identity and addresses of alibi witnesses. Id. at 478 n.12. The inadequate level of disclosure condemned by Wardius is precisely the level of disclosure which occurred in the instant case.

When the respondent, in complying with discovery orders, disclosed to the prosecution its potential witnesses including alibi witnesses, the prosecution had a continuing duty to notify him of the identity of all witnesses it might call, including alibi rebuttal witnesses. The identities of witnesses called to discredit the defendant's alibi witnesses are discoverable in order to prevent unfair surprise at trial. Had the respondent received the name of Sharon McDonald as a potential State witness, he would have deposed her as allowed under Indiana's liberal discovery rules. Then, he could have either attempted to find evidence to impeach her testimony or decided not to present his alibi witnesses. Reciprocal discovery of alibi witnesses "entitles a defendant to evaluate the strategy of advancing an alibi defense in light of the named rebuttal witnesses." United States v. Myers, 550 F.2d 1036, 1043 (5th Cir. 1977).

The decision of the Court of Appeals for the Seventh Circuit is not in conflict with any decision of another court of appeals or of this Court. The State has not otherwise shown that there exist "special and important reasons" for the review of the Seventh Circuit decision as required by Rule 17, Rules of the Supreme Court of the United States.

The State's suggestion, Petition at 7, that the instant decision is in conflict with United States v. Ortega-Chavez, 682 F.2d 1086 (5th Cir. 1982), and United States v. Bouye, 688 F.2d 471 (7th Cir. 1982), is erroneous. Those courts found no due process violation in the government's failure to disclose alibi rebuttal witnesses and in their subsequent testimony at trial. Crucial to both decisions was that the government did not demand from the defendant a notice of the intent to rely on an alibi defense. Ortega-Chavez at 1089, Bouye at 473. In the instant

case, however, the State filed a discovery request which sought disclosure of any defenses which would be asserted. In response, the respondent filed a list of the six witnesses he intended to call at trial and notified the State of his intention to rely on an alibi defense. Thus, the State's demand of notice of the petitioner's intent to rely on an alibi defense and its obtaining the short list of witnesses triggered a reciprocal obligation on the State to supply "'any other witnesses to be relied on to rebut [the] testimony of any of the defendant's alibi witnesses.'" Ortega-Chavez at 1089.

II. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE SEVENTH CIRCUIT'S HARMLESS ERROR ANALYSIS.

The Seventh Circuit in this case followed this Court's precedents in Chapman v. California, 386 U.S. 18 (1967), and United States v. Hasting, 461 U.S. 499 (1983), in determining that the State of Indiana's failure to afford reciprocal discovery to respondent was not harmless error. The court of appeals recognized that no witness positively identified respondent and that the testimony of the police officer who placed Mauricio near the scene of the crime was questionable. Accordingly, it correctly concluded that the evidence was not overwhelming and thus that the constitutional violation was not harmless:

> Any recapitulation of the evidence adduced at Mauricio's trial must begin with an acknowledgment that, as the Indiana Supreme Court stated, evidence of Mauricio's identification was "circumstantial." 476 N.E.2d at 91. In fact, neither of the witnesses to the crimes for which Arnold Mauricio was convicted could positively identify him as having been at the crime scene. Whoever accompanied Mark Mauricio on the night of February 3, 1982 was wearing a ski mask. If this fact alone were not sufficient to demonstrate that the State's evidence falls short of being "overwhelming", also questionable is the eyewitness identification of Mauricio by Officer Lalone, who identified Arnold Mauricio as the individual he stopped from riding his snowmobile in the street. On cross-examination, however, Lalone admitted to having mistakenly identified Mauricio to his partner, at a time when Mauricio had been incarcerated, as a man emerging from the county office building.

840 F.2d 454, 459-60 (7th Cir. 1988)

Petitioner asserts that the court of appeals decision in

this case is contrary to that court's decision in another case, Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982). That assertion was made in the State's petition for rehearing to the Seventh Circuit. The panel denied the petition and the entire court denied the suggestion for rehearing en banc. Alicea is distinguishable on its facts from the instant case. This Court does not normally grant a writ of certiorari to consider alleged conflicts of decisions in a single court of appeals, nor would it be appropriate for the Court to reweigh the facts of the two cases. The court of appeals carefully evaluated the facts presented in the record of respondent's trial; its determination that the evidence was not overwhelming should not be reviewed by this Court.

CONCLUSION

The Seventh Circuit decision in this case correctly applied existing precedent. Petitioner has not demonstrated any reason appropriate for this Court to consider reviewing the appellate court's decision. Accordingly, respondent requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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